No. 11403

In the United States
Circuit Court of Appeals
for the Ninth Circuit

THE UNITED STATES OF AMERICA,
Libellant-Appellant,

v.

WILLIAM R. OLSEN,
Claimant-Appellee,

and

ONE ARTICLE OF DEVICE LABELED IN PART "SPECTRO-CHROME" AND ACCOMPANYING LABELING,
Respondent.

Brief for Appellant

Appeal from the District Court of the United States for the District of Oregon

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Assistant Attorney General.
HENRY L. HESS,
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District of Oregon.
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ONE ARTICLE OF DEVICE LABELED IN PART "SPECTRO-CHROME" AND ACCOMPANYING LABELING,
Respondent.

APPELLANT'S BRIEF

Statement of Pleadings and Facts

A libel of information was filed by the United States in the District Court of the United States for the District of Oregon, pursuant to Section 304 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 334), for the seizure and condemnation of a device designated as "Spectro-Chrome" which had been transported in interstate commerce from Newfield, New Jersey, to Portland, Oregon. The de-

vice was alleged to be misbranded within the meaning of 21 U.S.C. 352(a). (R. p. 4). A monition or warrant of seizure was issued pursuant to the libel, and the United States Marshal took possession of the device at the home of one William R. Olsen, in Portland, Oregon.

Olsen appeared in the action as claimant and filed an answer (R. pp. 16, 17) and motion to dismiss. (R. pp. 26, 27). He contended that the device had been unlawfully and forcibly seized at his home, while it was being used by him for his own personal use, in violation of his Constitutional rights. He also contended that the device was not subject to the jurisdiction or process of the District Court in that such device was not in interstate commerce at the time of the seizure. After certain proceedings had been had in connection with the motion to dismiss, the Government and claimant entered into a stipulation. The stipulation admitted that the device was misbranded when introduced into and while in interstate commerce, and reserved the jurisdictional question, the question as to the invasion of the claimant's Constitutional rights, and the right in both parties to present testimony in connection with such questions. (R. pp. 40, 86). The case was tried to the Court without a jury, and a written opinion was rendered sustaining the claimant's contentions. (R. p. 45). Findings of fact and conclusions of law were made, and a judgment was entered. (R. p. 53). The judgment provides for the dismissal of the proceed-

ing and for the return of the device to the claimant. This Court granted the petition of the Government for a stay of that part of the judgment which directs the return of the device to the claimant. (R. pp. 61, 141).

This Court has jurisdiction, under 28 U.S.C. 225, to review the judgment of the District Court.

STATUES INVOLVED

(References are to 21 U.S.C.)

§ 321. Definitions: generally

For the purposes of this chapter—

(b) The term "interstate commerce" means (1) commerce between any State or Territory and any place outside thereof, * * *.

* * *

(h) The term "device" (except when used in paragraph (n) of this section and in sections 331(i), 343(f), 352(c), and 362(c)) means instruments, appartus, and contrivances, including their components, parts, and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.

* * *

(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any

article or any of the containers or wrappers, or (2) accompanying such article.

* * *

§ 334. Seizure—Grounds and Jurisdiction

(a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, or which may not, under the provisions of section 344 or 355, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issues of fact joined in any such case shall be tried by jury. * * *

§ 352. Misbranded Drugs and devices

A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

* * *

STATEMENT OF THE CASE

The "Spectro-Chrome" consists essentially of a cabinet with an electric light bulb, an electric fan, a container for

water, glass condenser lenses, and glass slides of different colors. The cabinet has an opening in front through which light from the bulb may shine through the glass slides. (R. pp. 2, 3). Treatments (Tonations) are given by shining the colored light on various areas of the human body, the particular color or colors prescribed depending upon the nature of the ailment.[1]

Claimant's motion to quash was brought on for hearing on April 29, 1946. The transcript of the proceedings appears in the printed record commencing at page 74. The Court directed the Marshal to return the device to the home of the claimant. (R. p. 81). This direction was complied with. No decision, however, was rendered on the motion. Thereafter, it was agreed by the stipulation referred to that the particular Spectro-Chrome device involved here, together with accompanying labeling consisting of an assortment of written, printed and graphic booklets, circulars and other matter, had been shipped from New Jersey about June 19, 1945, to claimant at Portland, Oregon, and had

---

(1) A condemnation suit under 21 U.S.C. 334, involving a similar Spectro-Chrome device and the same charges of misbranding (R. pp. 19, 83, 92), was tried on its merits to a jury in the United States District Court at Brooklyn, New York. The Government obtained a favorable verdict, and a decree of condemnation was entered, after a trial which lasted over six weeks.

been received by him about June 25, 1945. It is also agreed that the Spectro-Chrome is a device within the meaning of 21 U.S.C. 321(h), and that its labeling contained a number of false and misleading claims for the device in effecting the structure and functions of the human body, and regarding its curative and therapeutic value when used as directed in the cure, mitigation, treatment, and prevention of the diseases, conditions, symptoms and disorders of man. (R. pp. 42, 87). In short, it was agreed that the Spectro-Chrome was such a device which, because it was misbranded when introduced into or while in interstate commerce, was subject to seizure and condemnation as provided for in 21 U.S.C. 334 except for the defenses raised in claimant's motion to dismiss and answer.

At the trial, two Spectro-Chrome devices, shown to be substantially the same as the device involved in this proceeding, were offered by appellant and received in evidence as Government's Exhibits 1 and 2. (R. pp. 93, 105). Copies of the pamphlets, booklets, and other literature which had been seized, and which constituted the labeling of the device, were offered by appellant and were received in evidence as Government's Exhibits 3 to 17, both inclusive. (R. pp. 96, 97).

The "Home Guide", Government's Exhibit 3, represents the device as effective in the cure, mitigation, treatment and

prevention of about all of the diseases, ailments or symptoms to which man is subject, including, among others, gonorrhea, syphillis, scarlet fever, diphtheria, diabetes, appendicitis, and rupture. The following appears in Exhibit 17, Articles 5 and 11:

> "5. Stop promptly use of ALL drugs, dopes, medicines, pills, potions, plasters. Spectro Chrome can NOT be combined with other Healing Systems".

> "11. Stop all vaccines, serums, injections, antitoxins, immunizations, hypodermics".

The "Home Guide" (page 3) directs the user to subject himself to—

> "No Diagnosis—No Drugs—No Manipulation * * * No Surgery",

and on page 90 directs the patient to

> "Stop Insulin at once * * * eat plenty of raw or brown sugar and all the starches."

It is claimed, on page 57 of the "Home Guide", that all the disorders of the human body are "remedial" by Spectro-Chrome, except that it cannot set a broken bone. Testimony of the claimant as to the benefits his family had received from the machine, and that he intended to use it solely for family use at his home, was elicited by the Court and admitted over the repeated objections of the appellant. (R. pp. 101-111).

As is disclosed by the transcript of the evidence and the District Court's opinion, the Court did not consider any testimony on the question of the alleged forcible manner of seizure from the claimant's home. The Court held the view that, since the machine had been returned to the claimant's home, the entire matter of the manner in which the seizure was made was moot (R. pp. 85, 102), and that the case presented "the clear cut issue whether an instrument, harmless in itself, but accompanied by misleading literature as to the capabilities of the instrument, may be seized against his will from an adult person, compos, who states that he is satisfied with the machine, is being helped by its use, and wishes to keep it." (R. p. 46).[2]

The Court found that the machine was a device within the meaning of the Act, that it was misbranded when introduced into and while in interstate commerce, and that

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(2) It is manifest that the Court intended to and did retain jurisdiction of the res. (See transcript of proceedings in relation to the findings, R. p. 125). Where an article is seized, an entry of a decree is required before any disposition whatsoever can be made of such article. *In re United States,* 140 F. (2d) 19, 20 (C.C.A. 5); *United States v. 893 One Gallon Cans * * * Brown's Inhalant,* 45 F. Supp. 467 (D. Del.). In any event, jurisdiction is not lost by an unauthorized release of the res. See *The Rio Grande,* 90 U. S. 458, and *The Young American,* 30 Fed. 789, 791 (S.D. N.Y.).

jurisdiction existed in the sense that the machine was at all times within the territorial jurisdiction of the Court. (R. pp. 53-55). The Court also found that the claimant had purchased the machine solely for the use of himself and his family in his home, with no intention at any time of transporting, selling or using the machine for any commercial purpose; that the machine and the labeling were not inherently dangerous; and that claimant was satisfied with it, desired to keep it, and did not consent to the entry into his home for any purpose in connection with the case. (R. pp. 55, 56). The Court concluded that the Government was not entitled to a warrant for the seizure of the device from the claimant's dwelling house without his consent; that the machine was not being, or intended to be, transported in interstate commerce; that the machine was not in the course of interstate commerce; and that no interstate transportation was involved because the machine was in claimant's home for his own use, with no intention on claimant's part of transporting or selling it. (R. pp. 56, 57). Accordingly, the Court concluded that claimant was entitled to a judgment dismissing the libel and confirming the return of the device, and entered judgment accordingly. (R. p. 57).

It is evident that the Court tried and decided the case as if the machine had never been seized. The Court proceeded as if the question presented was whether, under the facts

disclosed, a warrant of seizure could properly issue under 21 U.S.C. 334 and the device seized and condemned. Thus, the objection made to the seizure in this case is not that it was wrongfully made. The objection is that the Government lacked the power to make it at all. It is the position of the District Court that the statute does not apply to a seizure in a person's home, and that if it does apply the statute is unconstitutional.

It is the contention of the appellant that the District Court erred in its finding that the machine is not inherently dangerous (R. pp. 56, 135), and in its Conclusions of Law. (R. pp. 56-57, 135-136). The Court's view, as revealed in its opinion, is that the seizure of the device from the claimant's home would be in derogation of the claimant's rights under the Fourth and Fifth Amendments to the Constitution. (R. pp. 47, 48). Appellant maintains that neither the Fourth nor Fifth Amendments applies to 21 U.S.C. 334. Appellant further contends that the location of the machine in claimant's home at the time of the filing of the libel or the issuance of the seizure warrant does not prevent the seizure and forfeiture of the machine, regardless of its alleged innocuous character or its intended use. Appellant contends that the District Court erred in concluding that claimant was entitled to the judgment which was entered in this case. Accordingly, the questions presented on this appeal are:

1. Does the fact that a misbranded device was transported in interstate commerce to a person's home, and retained there ostensibly for his intended personal use, prevent its seizure and condemnation under 21 U.S.C. 334?

2. Does the Fourth Amendment or the Fifth Amendment to the Constitution apply to a seizure made under 21 U.S.C. 334?

SPECIFICATION OF ERRORS RELIED UPON

1. The Court erred in concluding that no interstate transportation was involved in this case and that the device was not subject to seizure because its transportation had ended and the machine had been delivered to the claimant's home.

2. The Court erred in concluding that the seizure of the device in this case under 21 U.S.C. 334 would be in violation of the Constitutional rights of the claimant.

3. The Court erred in entering judgment for the dismissal of the libel and in directing the return of the device to the claimant.

ARGUMENT

INTRODUCTORY STATEMENT

The District Court found that claimant intended to keep the device for his own use and not for commercial use. The

self-serving declaration of the claimant as to his intended use, or the intended use to which the article is to be put, does not divest the Court of its power and obligation to condemn the article. *United States v. 52 Drums Maple Syrup, etc.,* 110 F. (2d) 914 (C.C.A. 2); *Union Dairy Co. v. United States,* 250 Fed. 231, 233 (C.C.A. 7). The only issue is whether the article was misbranded or adulterated when introduced into or while in interstate commerce. *United States v. 2 Bags * * * Poppy Seeds,* 147 F. (2d) 123, 128 (C.C.A. 6).

The District Court also found that the device and accompanying labeling are not inherently dangerous. (R. pp. 55-56). Since the Court was presumably influenced in its decision by such a finding, it is important to observe that the statute makes no distinction in respect to such a characteristic. By its terms, the Act covers articles whose labeling is false and misleading, as well as those which are dangerous to health. *United States v. Lexington Mill & Elevator Co.,* 232 U. S. 399. Accordingly, a finding of no inherent danger may not properly preclude a decree of condemnation.

It is to be noted, however, that there is no evidence to support the finding that the device and accompanying labeling are not in fact inherently dangerous. The libel of information alleges, in paragraph 4, that the device "when

* * * used as directed may delay appropriate treatment of serious diseases, resulting in serious permanent injury or death to the user". (R. p. 7). The directions for the use of the device are contained in the accompanying circulars and pamphlets. The danger to any person in following these directions is apparent in cases of scarlet fever, diphtheria, appendicitis, meningitis, rupture and many other diseases listed in the labeling. Thus, it is a matter of common public knowledge that a person suffering from diabetes must have insulin, and it would be suicidal for such a person to follow the directions in the labeling.

It seems clear, therefore, that the machine is recommended in its labeling as effective as a remedy or cure for a number of diseases which are universally recognized to be fatal unless subjected to proper medical or surgical treatment. The directions established the character of the device as inherently dangerous.

I

A MISBRANDED OR ADULTERATED ARTICLE WHICH HAS BEEN TRANSPORTED IN INTERSTATE COMMERCE IS SUBJECT TO SEIZURE WHEREVER FOUND.

The statutory language (21 U.S.C. 334(a)) authorizing the seizure of adulterated or misbranded articles is clear and unambiguous. Contraband articles are liable to be proceeded against by seizure process while they are "in interstate commerce, or at any time thereafter." There are no restrictions on the exercise of the authority by reason of the place or location of the article, the character of the establishment or place where it may be found, or the use to which it is intended to be put. The section clearly authorizes the filing of the libel and the issuance of the process after transportation has ended, and the making of the seizure at any place the article happens to be at the time it is found.

The District Court declared, however, that the machine, while in the claimant's home, was not being transported in interstate commerce, was not in the course of interstate commerce, had passed beyond its channels, and was in the possession of claimant in his home for his own use with no intention on his part of transporting it. The Court concluded that no interstate transportation was or had at any time been involved in this case. (Conclusion II a, R. p. 57).

It is obvious, however, that there is no foundation for this conclusion. It is contrary to Findings of Fact III and IV (R. pp. 54-55), and is not a legitimate inference to be drawn from the recital which precedes it. This conclusion, however, is one of the bases for the holding of the Court. As such, it denies the power of seizure specifically prescribed by the Act.

The power of the Government to seize and condemn adulterated or misbranded articles after shipment in interstate commerce was first considered by the Supreme Court in *Hipolite Egg Co. v. United States,* 220 U. S. 45, a case which arose under the similar, but more restrictive, provision of the Food and Drugs Act of 1906.

> *21 U.S.C. 14 (1934 ed.)*
>
> Any article of food, drug, or liquor that is adulterated or imsbranded * * * and is being transported from one State * * * to another for sale, or having been transported, *remains unloaded, unsold, or in original unbroken packages,* * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation." (Emphasis added.)

The case involved adulterated eggs which had been shipped in interstate commerce and seized in a bakery factory. It was contended that the District Court had no jurisdiction to proceed in rem against goods which had passed

out of interstate commerce before the proceedings were commenced. In meeting the contention, the Supreme Court said (p. 57):

"We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law, and the *only limitation of the power to execute such purpose which is urged is that the article must be apprehended in transit or before they have become a part of the general mass of property of the State.* In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and State power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and state jurisdiction over property legally articles of trade. *The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State.* The question in the case, therefore is, What power has Congress over such articles? *Can they escape the consequence of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law.* The power to do so is certainly appropriate to the right to bar them

> from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. *And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages.* The selection of such means is certainly within the breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution." (Emphasis added.)

McDermott v. Wisconsin, 228 U. S. 115, involved a State statute which required that goods, as a condition of their sale within the State, bear the label required by State law and none other. The goods in question had been shipped in interstate commerce and had been received at the retail store of the consignee. The cans had been taken from the shipping boxes and placed upon the shelves for sale at retail. The State statute had been construed to require that the labels required by the Federal law be removed from the cans before the first sale by the importer. The Supreme Court held the statute invalid because the State law was a wrongful interference with the power of Congress over interstate commerce. In answer to the contention that the State regulation was not inconsistent with the Federal Act because the goods on the retail shelves were

exclusively under State control, the Court said (pp. 134, 135):

"It is insisted, however, that, since at the time when the state act undertook to regulate the branding of these goods, namely, when in the possession of the plaintiffs in error and held upon their shelves for sale, the cans had been removed from the boxes in which they were shipped in interstate commerce, they had therefore passed beyond the jurisdiction of Congress, and their regulation was exclusively a matter for state legislation. This assertion is based upon the original package doctrine as it is said to have been laid down in the former decision of this court. * * * In the view, however, which we take of this case it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, as we have said, keeping within its Constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination and seizure necessary to enforce the prohibitions of the act, and when Sec. 2 has been violated the Federal authority, in enforcing either Sec. 2 or Sec. 10, may follow the adulterated or misbranded article *at least to the shelf of the importer.*

"Congress having made adulterated and misbranded articles contraband of interstate commerce, * * * provides in * * * the act that such articles may be proceeded against and seized for confiscation and con-

demnation while being transported from one State * * * to another for sale, or, having been transported, remaining 'unloaded, unsold, or in original unbroken packages', * * *. To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain 'unloaded, unsold, or in original unbroken packages.' * * * It is enough, *by the terms of the act,* if the articles are unsold, whether in original packages or not. Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of Sec. 10 *are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act.*" (Emphasis added.)

In the *McDermott* case, the Supreme Court also recognized the practical necessities which impelled Congress to authorize seizure of illicit articles after their interstate transportation:

Page 133:

"* * * it might be noted that as a practical matter, at least, the first time the opportunity of inspection by the Federal authorities arises in cases like the present is when the goods, after having been manufactured, put up in package form and boxed in one State and having been transported in interstate commerce, arrive at their destination, *are delivered to the consignee, un-*

> *boxed, and placed by him upon the shelves of his store for sale.*" (Emphasis added.)
>
> *Page 136:*
>
> "The opportunity for inspection enroute may be very inadequate. The real opportunity of Government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped and remain, as the act provides 'unsold'." * * *

Note, also, *Seven Cases Eckman's Alterative v. United States,* 239 U. S. 510.

It is equally true that, as a practical matter, the opportunity of inspection or the opportunity for seizure may first arise after the article has been delivered to the consumer, so that the power of seizure at that time is equally appropriate and essential to effect the purpose of the Act.

The conclusion which may properly be drawn from the decisions cited is that, in the exercise of the power to prevent the channels of interstate commerce from being used to enable illicit articles to reach the consumer, Congress may authorize the seizure and condemnation of the articles after transportation has ended. These decisions do not hold that the power of Congress to provide for seizure is limited by the doctrine of original packages, or to articles which "remain unloaded, unsold, or in the original unbroken package." This quoted restriction had been imposed in the 1906

statute and not by the Court. On the contrary, it is said in the *Hipolite* decision that, since the things which were being dealt with in that case were things that Congress had declared to be illegal and contraband, there was presented no dispute over articles of legitimate commerce. Rather, the question was whether "articles which are outlaws of commerce may be seized wherever found." The clear implication from the language used is that such a seizure would be an appropriate means in the exercise of the recognized authority to bar contraband articles from interstate commerce. This was what was done by the 1938 Act. That Act removed the restrictions of the 1906 statute that the article remain unloaded, unsold, or in the original unbroken package, by authorizing seizure of a contraband article "while in interstate commerce, or at anytime thereafter." The purpose is clear—to authorize the seizure of any article, which is contraband when shipped, at any time or place thereafter. The Congressional design is obvious in 21 U.S.C. 334(a) not only "to extend Federal control in this field throughout the farthest reaches of the channels of commerce" (see *Walling v. Jacksonville Paper Co.,* 317 U. S. 564, 567), but in addition "to the farthest reaches of Federal authority" (see *McLeod v. Threlkeld,* 319 U. S. 491, 493).

The obvious purpose thus to enlarge and strengthen the scope of the power of seizure under the present law may

be drawn from the clear intent of Congress to strengthen and enlarge Federal control over foods, drugs, devices, and cosmetics by the enactment of the Act of 1938. The legislative history plainly shows that its general purpose was "to set up effective provisions against abuses of consumer welfare growing out of inadequacies in the Food and Drugs Act of June 30, 1906," and that the old law contained "serious loopholes and is not sufficiently broad in its scope to meet the requirements of consumer protection under modern conditions" (H. R. Rep. 2139, 75th Cong., 3d Sess., p. 1, Dunn "Federal Food, Drug, and Cosmetic Act", p. 815). This purpose is recognized in *United States v. Dotterweich,* 320 U. S. 277, where the Supreme Court said (pp. 280, 282):

> "The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938, Congress extended the range of the control over illicit and noxious articles and stiffened the penalties for disobedience.
>
> * * *
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> "* * * Nothing is clearer than that the later legislation was designed to enlarge and stiffen the penal net and not to narrow and loosen it."

What is contended for here is an interpretation of the seizure provision of the Act which is consistent both with

the language of the section and the liberal construction which the courts have uniformly declared should be given to food and drug legislation to effectuate its remedial purposes. *United States v. Research Laboratories, Inc.,* 126 F. (2d) 42 (C.C.A. 9), cert. denied 317 U. S. 656; *Arner Co., Inc. et al. v. United States,* 142 F. (2d) 730, 736 (C.C.A. 1), cert. denied 323 U. S. 730; *United States v. 62 Packages, etc., Marmola Prescription Tablets,* 48 F. Supp. 878, 887 (D. Wis.), aff'd 142 F. (2d) 107 (C.C.A. 7), cert. denied *Raladam Co. v. United States,* 323 U. S. 731. Particularly significant is a recent statement of the Supreme Court in *United States v. Dotterweich,* 320 U. S. 277, 280, regarding a criminal prosecution under the Act of1938:

> "The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. *Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words."* (Emphasis added.)

There is no indication in the language of the seizure section that it was not intended to cover seizures of contraband articles in a private dwelling. On its face it covers such seizures. It is well-settled that, where the language of a statute is plain and does not lead to absurd results, it is to be accepted by the courts as the evidence of the ulti-

mate legislative intent. *Caminetti v. United States,* 242 U.S. 470; *United States v. Standard Brewery,* 251 U. S. 210, 217. Where there is no exception, the presumption is that none was intended and general terms should be limited only where the liberal application would lead to absurd results. *United States v. Katz,* 271 U. S. 354.[3]

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(3) The scope of the broad language of the seizure section was brought to the attention of Congress. Sec. 2800, one of the predecessors of the bill which was finally enacted as the Federal Food, Drug, and Cosmetic Act, contained substantially the same provision for seizure—"while in interstate commerce or at any time thereafter." At the Senate Hearings (Hearings Before the Committee on Commerce, United States Senate, Seventy-third Congress, Second Session, on Sec. 2800), James F. Hoge, representing the Drug Institute of America, made the following statement (p. 395):

> "The present law permits seizure only while the article to be seized is moving in interstate commerce, or remains unsold or in unbroken original packages. This bill permits seizure while the article is in interstate commerce or 'at any time thereafter', which, I suppose, authorize seizure of articles, which have passed out of interstate commerce and mingled with the general property in the various States, on the shelf of a retailer or in the cupboard of a citizen, if at any time it had been the subject of interstate commerce."

II

A LIBEL FOR CONDEMNATION ACTION UNDER 21 U.S.C. 334 IS NOT A CRIMINAL PROCEEDING.

A seizure action under the Federal Food, Drug, and Cosmetic Act is an action in rem. The Act provides that the procedure "shall conform, as nearly as may be, to the procedure in admiralty", with right of trial by jury (21 U.S.C. 334(b)). The process under Rule 10 of the Admiralty Rules is by warrant of seizure directing the Marshal to take possession of the contraband article. It is intended to liken the proceedings to those in admiralty insofar as the seizure of the article by process in rem is concerned. The proceeding then possesses "the character of a law action, with trial by jury if demanded."[4] This procedure was chosen by Congress as an appropriate and expeditious means to carry out the purpose of the Act.[5]

The theory of the statute is that the seized article itself has violated the law, and the offense is attached to the article. *United States v. 149 Gift Packages, etc.*, 52 F. Supp. 993 (E.D. N.Y.); *United States v. Five Boxes of Asafoetida,*

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(4) *443 Cans of Frozen Egg Product v. United States,* 226 U. S. 172, 183.

(5) *United States v. 935 Cases, etc.,* 136 F. (2d) 523 (C.C.A. 6), cert. denied *Ladoga Canning Co. v. United States,* 320 U. S. 778.

181 Fed. 561 (E.D. Pa.); *United States v. 935 Cases, etc.,* 136 F. (2d) 523 (C.C.A. 6), cert. denied *Ladoga Canning Co. v. United States,* 320 U. S. 778. Under the Food and Drugs Act of 1906 (21 U.S.C. 1 et seq., 1934 ed.), adulterated and misbranded articles were described as "culpable," "illicit articles," "outlaws of commerce" (*Hipolite Egg Co. v. United States,* 220 U. S. 45), and "contraband of interstate commerce" (*McDermott v. Wisconsin,* 226 U. S. 115). The same characterizations undoubtedly are applicable under the comparable provisions of the 1938 statute (21 U.S.C. 334).

The proceeding under 21 U.S.C. 334 is civil in character as distinguished from a criminal or penal proceeding. The criminal provisions in the Act (21 U.S.C. 333) are wholly independent of the seizure provisions. Unlike the situation involved in *Boyd v. United States,* 116 U. S. 616, the seizure proceeding has no relation to any criminal or penal proceeding against the shipper or claimant. *United States v. Five Boxes Asafoetida, supra.* The offense upon which Section 334 is based is attached primarily to the article or device, without any regard to the rights of the shipper or claimant beyond what necessarily arises from the fact that the statute permits the claimant to appear and contest the grounds upon which the forfeiture is based. No provision is made under this section for the enforcement against the owner, the claimant or otherwise, of any penalty or forfeiture

in the nature of punishment for a violation, and the proceeding is distinguishable from that where the forfeiture is deemed to be a punishment inflicted upon the owner in the criminal law sense. *United States v. Three Tons of Coal,* 28 Fed. Cas. 149, 154 (E. D. Wis.): *Dobbins Distillery v. United States,* 96 U. S. 395.[6]

The only issue in the condemnation suit is whether the article has been transported in interstate commerce in violation of the Act, and the only judgment to which the Government is entitled is one directing the condemnation of the offending article and its destruction where it is not brought into compliance with the Act in accordance with the procedure outlined in 21 U.S.C. 334(d).

The Act does not declare the article ipso facto forfeited

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(6) "Cases arise, undoubtedly, where the judgment of forfeiture necessarily carries with it, and as a part of the sentence, a conviction and judgment against the person for the crime committed; and in that state of the pleadings it is clear that the proceeding is one of a criminal character; but where the information, as in this case, does not involve the personal conviction of the wrong-doer for the offense charged, the remedy of forfeiture claimed is plainly one of a civil nature, as the conviction of the wrong-doer must be obtained, if at all, by another and wholly independent proceeding." *Dobbins Distillery v. United States,* 96 U. S. 395, 399.

by an infraction of its provisions. The seizure is made not because the article is forfeited, but because it is subject to forfeiture on account of the violation, and it is essential that the res come into the possession of the Court in order to obtain jurisdiction under the Admiralty Rules. The owner or claimant may appear in the action and contest the issue of adulteration or misbranding by jury trial if demanded. Provision is made whereby the article may be returned to the claimant under bond for the purpose of bringing it into compliance with the provisions of the Act under the supervision of the Federal Security Agency (21 U.S.C. 334(d)).

There is nothing unusual in the seizure of a contraband article in a private dwelling. Provision for the seizure of contraband is made under revenue statutes and other regulatory laws. None of these contains such a limitation on the place of seizure, for the obvious reason that the home is not intended as an asylum for contraband. As is shown subsequently in this brief, the home is not protected against all seizures but only against those which are unreasonable within the meaning of the Fourth Amendment.

III

THE FORTH AMENDMENT DOES NOT APPLY TO A SEIZURE PROCEEDING UNDER 21 U.S.C. 334.

The power of Congress to regulate interstate commerce is plenary and complete in itself, may be exercised to the utmost extent, and acknowledges no limitations other than are prescribed by the Constitution. *Gibbons v. Ogden,* 9 Wheat. 1, 196; *United States v. Darby,* 312 U. S. 100. Thus, Congress may exclude from interstate commerce articles whose use, in the States for which they are destined, it may reasonably conceive to be injurious to the public health, morals, or welfare, or which might spread harm and deception among the people of the several States. *Reid v. Colorado,* 187 U. S. 137; *Lottery Case,* 188 U. S. 321; *United States v. Darby, supra; Hipolite Egg Co. v. United States,* 220 U. S. 45. It is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the States. *Seven Cases of Eckman's Alterative v. United States,* 239 U. S. 510, 514-515. See *Carolene Products Co. v. United States,* 323 U. S. 18.

The Commerce Clause permits Congress to avail itself of any means deemed appropriate by it to the effective exercise of the power to regulate interstate commerce, irrespective of the intrastate nature of the transaction or activity

controlled. *United States v. Wrightwood Dairy Co.,* 315 U. S. 110; *Wickard v. Filburn,* 317 U. S. 111. The essential purpose of the Federal Food, Drug, and Cosmetic Act, and particularly of 21 U.S.C. 334, is to "prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food". *McDermott v. Wisconsin,* 228 U. S. 115, 131. It seems clear, therefore, that the exercise of the commerce involved in the instant case is not invalid unless it violates a specific prohibition contained in the Constitution. It is the view of the District Court that in the instant case the Fourth Amendment to the Constitution was violated.

The Fourth Amendment, however, does not denounce all seizures, but only such as are unreasonable. It is to be construed in the light of what was deemed unreasonable when it was adopted, and in a manner which will conserve public interest as well as the interests and rights of the citizen. *Carroll v. United States,* 267 U. S. 132. The language of the Amendment does not prohibit all seizures in a home or guarantee against all such seizures without a search warrant. It is recognized in *Gouled v. United States,* 255 U. S. 298, 309, that there is a "primary right" to search and seizure which "may be found in the interest which the public or the complainant may have in the property to be seized, * * * or when a valid exercise of the police power renders

possession by the accused unlawful and provides that it may be taken." Without attempting to define their scope, it may be said that most of the decisions defining or upholding rights under the Fourth Amendment deal with the attempted use as evidence in a criminal case of papers or documents, otherwise wholly innocuous, taken or obtained from the premises of the accused. It is pointed out in such cases that, where the seizure of the papers or documents could only be for the purpose of their use in evidence against the accused, it would be impossible for the Government to have such an interest in the property that it would have the right to take the property into possession in the carrying out of some recognized authority. See *Gouled v. United States, supra.* In other cases, the use *as evidence* of contraband articles illegally taken from the accused is condemned. See *Amos v. United States,* 255 U. S. 313; *Agnello v. United States,* 269 U. S. 20.

However, it was never intended that articles of contraband could not be *recovered* from a private dwelling when it is not intended to use such property in violation of a Constitutional right, or that the Constitutional provision should provide an asylum for the protection of such property or prevent its seizure wherever it may be found. A distinction is always made between property of which the Government is entitled to possession and property of which it is not. See

Davis v. United States, 66 S. Ct. 1256. As is pointed out in *Boyd v. United States,* 116 U. S. 616, 623:

> "The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him.[7]

If the property is contraband by reason of its character as lottery tickets or illicit liquor, or otherwise, it may be subjected to seizure for the reason that the thing in such case

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(7) "The two things differ toto coelo. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. * * * So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements, or gambling, etc., are not within this category. Many other things of this character might be enumerated." *Boyd v. United States, supra.,* pp. 623, 624.

is primarily considered as the offender, and the taking cannot be held to be unreasonable under the Fourth Amendment.

Misbranded or adulterated articles shipped in interstate commerce are considered outlaws of commerce (*McDermott v. Wisconsin,* 228 U. S. 115, 128), whose "confiscation or destruction are special concern of the law." "We are dealing, * * * with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them * * * and the shipper of them." *Hipolite Egg Co. v. United States,* 220 U. S. 45, 57. Clearly, it is the design of the Act to place such illicit articles in the same category as goods which have been stolen, coin which is counterfeit, and other things of the character referred to in *Boyd v. United States, supra.* By providing for their seizure and forfeiture as an appropriate means of enforcement, the Act declares that the Government's right to their possession is prior and superior to that of any person.

The procedure under 21 U.S.C. 334 requires the filing of the libel and the issuance of a process in accordance with the Admiralty Rules. Rule 10 provides that "the process, if issued * * * shall be by a warrant of arrest of the * * * goods, or other thing to be arrested; and the Marshal shall thereupon arrest, and take the * * * goods, or other thing

into his possession for safe custody." The term "arrest" imports an actual seizure of the property (*Yokohama Specii Bank, Ltd. v. Chengting T Wang,* 113 F. (2d) 329 (C.C.A. 9)), and Section 334(b) provides "The article shall be liable to seizure by process pursuant to the libel."[8]

As previously shown, the proceeding is civil and not criminal and involves only the seizure and condemnation of the contraband article. Obviously, the process is a civil process in the nature of a civil attachment and has no relation whatsoever to criminal proceedings. The protection of the

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(8) Unlike 21 U.S.C. 334, and similar to seizure cases in admiralty, statutes such as the prohibition, customs, and tariff acts have authorized forfeiture proceedings *preceded* by an initial executive seizure of the property. In such cases, as the Supreme Court has stated, "anyone may seize any property for forfeiture to the Government, and * * * if the Government adopts the act and proceeds to enforce the forfeiture by legal process, this is of no less validity than when the seizure is by authority originally given. * * * The owner of the property suffers nothing that he would not have suffered if the seizure had been authorized. * * * We can see no reason for doubting the soundness of these principles when the forfeiture is dependent upon subsequent events any more than when it occurs at the time of seizure. * * * The exclusion of evidence obtained by an unlawful search and seizure stands on a different ground." *Dodge v. United States,* 272 U. S. 530, 532.

Fourth Amendment does not extend to a process of that character. As is stated in *Boyd v. United States,* 116 U. S. 616, 624, "The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendments, or any other clause of the Constitution; * * *" In *Murray's Lessee v. Hoboken Land and Improvement Co.,* 18 How. 272, which involved a warrant of distress against deliquent collectors of Federal revenues, it is held that the Fourth Amendment has no reference to such proceedings.[9]

The decisions reveal that the Fourth Amendment is not intended to apply to seizures under 21 U.S.C. 334. In *United States v. 935 Cases Tomato Puree,* 136 F. (2d) 523 (C.C.A. 6), cert. denied *Ladoga Canning Co. v. United States,* 320 U. S. 778, there was involved the seizure and condemnation of adulterated food under 21 U.S.C. 334. The claimant moved to quash the warrant for the seizure, and the seizure of the goods, on the ground that since the libel of information filed by the United States Attorney had not been verified, the warrant for seizure was issued

(9) A private dwelling is not protected against a levy on goods under an attachment (7 C.J.S. 393), or execution (33 C.J.S. 242).

and the seizure was made without a showing of probable cause supported by oath, etc., in violation of the Fourth Amendment. In answer to this contention, the Circuit Court of Appeals for the Sixth Circuit said that under the Act the proceedings are in rem in accordance with the Admiralty Practice, and that the Rules of Admiralty do not require the libel to be verified. The Court declared that Congress had the full power to carry out the purpose of the Act, and that the procedure prescribed was appropriate to that end. The point was stressed that the proceeding was not, in any aspect, a criminal case, but a libel in rem which undoubtedly was a civil action. The Court pointed out that no significance should be attached to the words "warrant of arrest" in the Admiralty Rules, because its usage bears no resemblance to the word "warrant" in the Fourth Amendment. The conclusion was that the seizure in the manner prescribed under the Act was not an unreasonable seizure in contravention of the Amendment.

In *United States v. Eighteen Cases of Tuna Fish,* 5 F. (2d) 979 (W.D. Va.), involving the similar seizure provision in the Food and Drugs Act of 1906 (21 U.S.C. 14 (1934 ed.)), it was the view of the Court that the Fourth Amendment was not intended to apply to an attachment for the seizure of property; that there was no historical evidence of abuses in respect to writs of attachment prior to the adoption of the Fourth Amendment, and, therefore, no

reason for an intent to correct them. To the same effect is *United States v. 62 Packages, etc., Marmola Prescription Tablets,* 48 F. Supp. 878 (W. D. Wis.), aff'd 142 F. (2d) 107 (C.C.A. 7), cert. denied *Raladam Co. v. United States,* 323 U. S. 731. *United States v. Eight Packages, etc.,* 5 F. (2d) 971 (S.D. Ohio), is to the contrary, but the Court had an erroneous conception as to the nature of the proceeding, and the decision is overruled in the *Ladoga Canning Company case, supra.*

Although the question of a seizure in a private dwelling was not involved in the above cases, we fail to see how the fact that the article is being held by the owner in his private dwelling distinguishes the instant case. The rationale of these decisions is that the proceeding, which is an in rem action against the article, is civil in character and does not involve the rights of a person except as may result from the determination of the issue as to the illicit character of the article and its disposition. The seizure of the property is necessary as a condition to the jurisdiction of the Court in the in rem proceeding under the Admiralty Rules. This procedure has been upheld as an appropriate and legitimate means of enforcement, and the taking of the property is a necessary step in the proceeding. Under 21 U.S.C. 334 the property is seized only for the purpose of condemning it as contraband. The rights of the claimant are fully protected by a trial—by jury if demanded. If the property is capable

of legitimate use, it may be returned under bond for reconditioning (21 U.S.C. 334(d)).

The contention of the claimant is in effect that, although illicit and harmful articles are otherwise subject to seizure, they acquire an immunity when placed in a home. It is obvious that there can be no basis for such a contention. The fact that an illicit article may be found in a private dwelling certainly does not change its character or the nature of the proceeding. If such were the protection guaranteed by the Constitution no seizure at all could be made, even under a search warrant properly issued under a statute which contained the authorization. It is clear that no such guarantee exists. The Constitutional provision is not designed to protect the possession of illicit contraband articles, but to protect against arbitrary and unreasonable seizures that invade rights in legitimate property.

IV

THE OPERATION OF 21 U.S.C. 334 DOES NOT VIOLATE THE FIFTH AMENDMENT.

The District Court concluded that the right of personal liberty under the Fifth Amendment, what the Court described as the "right to control the manner in which a person shall seek to cure himself", had been denied. (R. pp. 48-49). Since the classic statement in *McCullough v. Mary-*

land, 17 U. S. 316, the doctrine has been continuously reaffirmed that within its recognized authority Congress may adopt such measures, having reasonable relation to the end sought, as it may deem necessary to make its action effective. As already indicated, in the exercise of its control over interstate commerce, the means employed by the Congress may have the quality of police regulations. *Hamilton v. Kentucky Distillery Co.,* 251 U. S. 146; *Brooks v. United States,* 267 U. S. 432, 436; *Kentucky Whip & Collar Co. v. I.C.R. Co.,* 299 U. S. 334, 346. The Fifth Amendment imposes no greater limitation upon the national power than the Fourteenth Amendment on the State power. *Hamilton v. Kentucky Distillery Co., supra.*

The Constitution does not always prevent interference with private affairs. The Supreme Court has stated that, although the use of property is normally a matter of private and not of public concern, property rights are not absolute, for equally fundamental with the private right is that of the public to regulate it in the common interest. It has said that:

> "No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of a citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as it has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York,* 291 U. S. 502, 523-4-5.

In considering the limitations on the police power of the States or the power over interstate commerce of the Federal Government, it is well-settled that questions of policy wisdom and expediency are for legislative determinations, which will not be disturbed unless the regulation has no relation to the end for which the power is exercised. The action of the legislature is final unless the measure adopted appears clearly to be arbitrary or to have no relation to the object sought to be obtained. *United States v. Carolene Products Co.,* 304 U. S. 144; *Carolene Products Co. v. United States,* 323 U. S. 18; *Otis v. Parker,* 187 U. S. 606, 609; *Purity Extract Co. v. Lynch,* 226 U. S. 192; *Everhard's Brewery v. Day,* 265 U. S. 545.

It is the acknowledged power of Congress to prevent the facilities of interstate commerce from being used to

place misbranded or adulterated articles before the consumer. *McDermott v. Wisconsin,* 228 U. S. 115; *Seven Cases of Eckman's Alterative v. United States,* 239 U. S. 510. And it was long since held in *Hipolite Egg Co. v. United States,* 220 U. S. 45, that the similar seizure provisions in the Food and Drugs Act of 1906 were an appropriate means in the exercise of a Constitutional power, the selection of which was certainly within the breadth of discretion vested in Congress. As pointed out, the implication of that decision is that there need be no limitation as to the place of seizure. It must, therefore, stand as admitted that the Government, consistent with the due process clause, may forbid the shipment of illicit articles in interstate commerce, and that the seizure of the contraband article anywhere within the jurisdiction of the Federal Government is an appropriate and Constitutional means to make the prohibition effective. What, then, is the right in such property which is capable of any protection under the Fifth Amendment? A person in possession of forfeited property has no right to the protection of his possession against the United States. Such property is always rightfully subject to seizure on behalf of the Government. *Milan v. United States,* 296 Fed. 629 (C.C.A. 4), cert. denied 265 U. S. 629; *United States v. McBride,* 287 Fed. 214 (S.D. Ala.), aff'd 284 Fed. 416 (C.C.A. 5), cert. denied 261 U. S. 604; *Boyd v. United States,* 286 Fed. 930 (C.C.A. 4); *Glennon v. Britton,*

40 N. E. 594 (Ill.); *State v. Derry,* 85 N. E. 765 (Ind.); *Dodge v. United States,* 272 U. S. 530. It is said generally that there can be no Constitutional protection against the seizure of property which is designed to perpetrate a fraud upon the public, providing it is taken in a Constitutional manner. *Gouled v. United States,* 255 U. S. 309. It is very doubtful whether there can be any property or possessory right in contraband property which may be protected under the Constitution against Congressional enactment. *Sligh v. Kirkwood,* 237 U. S. 52, 59; *Zeffrin, Inc. v. Reeves,* 308 U. S. 132. It follows that there can be no protected right in an article which has been transported in violation of the Act and is, therefore, of an illegal and contraband character.[10]

The device involved acquired its character as contraband by reason of its illegal transportation. It became liable to forfeiture the moment it was introduced into interstate commerce, and before it came into the possession of the claimant. Its subsequent possession by the claimant in his

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(10) Even a concededly illegal seizure of contraband does not prevent its condemnation and forfeiture. *United States v. One Studebaker, etc., Sedan,* 4 F. (2d) 534 (C.C.A. 9); *United States v. Eight Boxes, etc.,* 105 F. (2d) 896 (C.C.A. 2); *Dodge v. United States,* 272 U. S. 530. The rule is the same even though the article was seized from a home without a search warrant. See *Bourke v. United States,* 44 F. (2d) 371 (C.C.A. 6).

home did not change its illegal character, or its status as subject to the seizure provisions of the Act.[11] The device is still the very unlawful thing transported contrary to law. As we have shown, the law draws a distinction between things forfeited or illegal, and property or effects which may legally be owned and held.

The fallacy in the District Court's conclusion that the seizure of the device would violate the claimant's Constitutional rights because it was in his home for his own personal use is that it fails to take into account the character of the property thus sought to be protected. It fails to take into consideration the acknowledged power to keep illicit and harmful articles out of the channels of commerce, and to make them outlaws of such commerce and thus give to them the character of contraband subject to forfeiture.

It must follow that, whether the taking of an article from a private dwelling is in itself unreasonable is to be determined by the character of the property and the manner of the seizure—the same test as in the case of other contraband such as stolen property, illicit liquor, or lottery tickets. If these last-named articles are capable of seizure in a home under a search warrant properly issued and executed under

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(11) Certainly there is no assurance that the article will be retained in the private home, or that it will be used only by those who reside there.

the applicable law, there can be no valid objection to the seizure of adulterated or misbranded articles under a warrant of monition issued pursuant to 21 U.S.C. 334.

We contend that the District Court mistakes the case if it rests its decision on the proposition that the appellant does not have the right to declare what implements the claimant may use in his own home for his own personal use. The appellant does not venture to make any such declaration. It is not the use of the contraband article which the appellant undertakes to manage but the traffic in it. There is no design to interfere with the right of the individual to select his own manner and means of treatment, and it is plain that the claimed interference with this right in this case is entirely incidental. Even so, acts innocent or not in themselves subject to regulation are often restricted as an incidental result of the legislative choice of appropriate means to make the regulation effective. *Purity Extract Co. v. Lynch,* 226 U. S. 192; *Clark Distillery v. Western Md. Ry. Co.,* 242 U. S. 311; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.,* 299 U. S. 334. "*It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government*". *Purity Extract Co. v. Lynch,* 226 U. S. 192, 201. (Emphasis added.)

And on the question of individual use, the Supreme Court said in *Clark Distillery Co. v. Western Md. Ry. Co.*, 242 U. S. 311, 320, which involved a question of the power of the State to enact a prohibition law consistent with the due process clause of the Fourteenth Amendment: "Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, as an incident to the right to forbid manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use were permitted." Admittedly the seizure of any illicit food, drug, or device restricts the rights of all those who would choose to use such article, but this is no valid objection. The liberty safeguarded under the Constitution is not an absolute or uncontrollable liberty.[12] "* * * the liberty safeguarded is a liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people." *West Coast Hotel*

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(12) "Neither is it an effective objection to a statute if some of those will be protected by its provisions oppose such protection, for the state has such an interest in the welfare of its citizens that it may, if necessary, protect them against even their own indifference, error or recklessness." *People v. Charles Schweinler Press,* 108 N. E. 639, 642 (N.Y.), Ann. Cas. 1916D 1059, 1062, writ of error dismissed, 246 U. S. 618:"

Co. v. Parrish, 300 U. S. 379, 391. The District Court indicated the possibility of interference with trivial matters. But the possibility of an unwise use of power does not establish that the power does not exist. See *United States v. Dotterweich,* 320 U. S. 277, 285.

CONCLUSION

For the foregoing reasons, we respectfully submit that the District Court erred in holding that the claimant was entitled to a return of the "Spectro-Chrome" device, and in entering judgment directing its return to claimant. Since it is admitted that the device was misbranded when introduced into and while in interstate commerce, we urge that the judgment be reversed and the District Court directed to enter a decree for appellant as prayed for in the libel.

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